

Sectarian Appeals in Elections

Interpreting Representation of the People Act Well

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The Supreme Court's judgment on sectarian appeals during election campaigns interprets the Representation of the People Act, 1951 correctly and to its intended effect. The dissenting judgment conflated the substance of the appeal with the identity of the person who is making it, and did not address the scope of the case. The majority judgment's regulation of election speech is not only necessary to ensure free and fair elections and uphold the secular ethos of the Constitution, but it is also needed to fulfil the constitutional goal of fraternity.

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The Supreme Court's judgment in *Abhiram Singh v C D Commachen* (2017), widening the ban on sectarian appeals during election campaigns, must be welcomed as a positive and necessary step towards free and fair elections.

While sectarian appeals to religion, caste, community, race and language have been banned in some form since the Representation of the People Act, 1951 (RPA) came into force, the true scope of such a ban has finally been made clear by the seven-judge bench after much muddled controversy on the point.

Ostensibly, the point of difference between the four judges who comprised the majority opinion and the three judges who comprised the minority opinion, rests on an interpretation of the word "his" as it occurs in Section 123(3) of the RPA. The opposing judgments also present two different views of democracy and citizenship in India (Bhatia 2017).

The majority view is more focused on the purity of the electoral process—of elections being an appeal to a common citizenry to vote for the best-positioned candidate—to ensure that the interests of all are protected (putting aside sectarian interests). The minority view is more concerned with the history of oppression and discrimination in India, of the divisions in society which need to be rectified by the state.

However, the two views are not necessarily incompatible and I would argue that the majority judgment also addresses the concerns highlighted by Justice D Y Chandrachud in his dissenting judgment.

This article will address what the *Abhiram* judgment means and what it does not. The first section will deal with its impact on the infamous "Hindutva judgment" in the context of "corrupt practices"

under the RPA. The next section will analyse the four opinions by the seven judges, where I also argue that the interpretation afforded by the majority is preferable. The last section asks whether laws should govern electoral speech in the first place, when they do not involve calls to violence or cause harm to others.

'Hindutva Judgment' Merely an Observation

In *Ramesh Yeshwant Prabhu v Prabhakar Kashinath Kunte* (1996), Justice Verma had described "Hindutva" to mean "a way of life of the Indian people," suggesting that the term did not necessarily denote "hostility, enmity or intolerance towards other religious faiths." Verma's description completely ignored the political context in which Hindutva was being used or the manner in which it had in fact been used in the case before him.

While Verma's judgment has been rightly criticised for its entirely unwarranted and confusing observations on what is "Hindutva" (Noorani 2014), it is sometimes forgotten that the judgment did in fact uphold the disqualification of the Shiv Sena legislator Ramesh Prabhu. The judgment also banned Bal Thackeray from contesting elections for a period of six years for sectarian appeals in his campaign speeches. The observations in the "Hindutva judgment," problematic as they are, are just that and not findings on law or facts. As such, no court is bound to follow it or give credence to it in deciding a case.

That said, the criticism of the "Hindutva judgment" has also meant that a problematic interpretation of Section 123(3) has gone unnoticed. In the Prabhu judgment, the word "his" in Section 123(3) was interpreted narrowly: only if a candidate made a sectarian appeal on the basis of her own affiliation or identity, would it amount to a "corrupt practice." This did not have a bearing on the ultimate finding of the case, but as an interpretation of the law, it was not based on very sound reasoning.

In the *Abhiram* judgment, the Court has set aside this particular interpretation of the law and held that Prabhu is no longer a good law. I will discuss why

the Supreme Court's interpretation of Section 123(3) in *Abhiram* is right in the next section.

Comparing Majority and Dissenting Judgments

Three opinions were delivered on behalf of the four judges in the majority and I will deal with each of them in turn.

The majority view: Justice Madan Lokur's opinion, also on behalf of Justice Nageswara Rao, explores the legislative history of Section 123(3) and how it has been slowly expanded over the years. The bill amending subsection (3) to its current form states specifically that the intent was to "widen the scope of the corrupt practice..." mentioned in that section.

This was done by removing the term "systematic" to make even a single such sectarian appeal a "corrupt practice" and increasing the grounds of what constitutes such sectarian appeal. The opinion also takes note of the fact that this was part of the "package deal," accompanied with the introduction of Section 153-A into the Indian Penal Code to prevent violence on sectarian lines in the country.

Concluding that the purpose of the amendments to Section 123(3) were to widen the scope of the law, Lokur held that a narrow interpretation of the word "his"—and therefore to limit the clause only to the identity or affiliation of the candidate—would defeat the purpose of the amendment.¹ The wider interpretation of the word "his" to include the religious affiliation and identity of either the elector or the candidate, achieves the purpose of Parliament, as is obvious not only from the history of this clause, but also the detailed discussions that preceded its introduction.

Justice S A Bobde supplemented Lokur's view, pointing out that even a literal interpretation of Section 123(3) could give the word "his" a wider meaning than the one given in *Prabhoo*, perhaps arguing that even the literal interpretation offered in that case did not get it right.

Chief Justice T S Thakur's opinion is the only one of the four, which refers to both Lokur's and Chandrachud's opinions. This suggests that the majority and dissenting opinions were written entirely separately

and hence lack engagement with each other's arguments. This is a pity, as the debate would no doubt have been enriched if the points raised by either side of the debate could have been addressed specifically.

Like Bobde, Thakur preferred to only supplement Lokur's opinion, referring to the secular ethos of the Constitution as a reason to prefer the wide interpretation of Section 123(3). His discussion does not address the other grounds of sectarian appeal such as caste, language, race or community, but focuses only on appeal to religion. To some extent, what he says about religion as a basis for sectarian divisions applies to all the other categories as well, but his focus on religion suggests that he sees this as the most dangerous divisive force.

The minority view: D Y Chandrachud, on behalf of Justices Uday Lalit and Adarsh Goel, delivered the dissenting judgment. These three judges prefer the narrow interpretation of "his," that is, Section 123(3) is supposed to cover only those sectarian appeals where the candidate and the electors are of the same identity or affiliation.

Chandrachud's opinion treats Section 123(3) as a "quasi-criminal" provision, relying on judgments that have said that election petitions challenging elections on the ground of "corrupt practices" have a quasi-criminal character. However, all of the cases cited by him relate to the burden of proof and not on the question of how to interpret the scope of the "offence" itself. The opinion also erroneously cites the dissenting view in *Bipinchandra Parshottamdas Patel v State of Gujarat* (2003) to hold that a clause relating to disqualification should be interpreted strictly, while in fact the Court in that case held that a purposive interpretation should be adopted.

As Bobde pointed out, a strict interpretation could also give Section 123(3) a wider meaning and Chandrachud does not convincingly argue (while dissecting Section 123(3)) why a strict interpretation of Section 123(3) must necessarily be the narrow interpretation.

Analysing the dissenting view: The minority opinion moves, in one step, from

the nitty-gritty of parsing Section 123(3) to the soaring rhetoric of equality, discrimination and justice under the Constitution, and the matter of addressing historical injustices through the electoral process. While this is all very well, it is hard to see what this has to do with a narrow interpretation of Section 123(3). The key flaw in Chandrachud's argument is that his opinion conflates the substance of the appeal with the identity of the person who is making it.

His rationale would be entirely relevant if the scope of the case was whether a given speech was a sectarian appeal, but the scope of *Abhiram* is different. It rests on whether given a sectarian appeal, would the difference in the identity or affiliation of the candidate and the voter make a difference? With respect, Chandrachud's opinion fails to adequately answer this question with reference to either the statute or the Constitution.

Both the majority and dissenting judgments articulate entirely valid ways of conceiving citizenship; the majority's view is an ideal that the Constitution asks us to strive for, and the minority's view is the reality that needs to be accounted for. However, Chandrachud's interpretation of Section 123(3) does not seem to tie with this world view. Equally, nothing about the majority's reading of Section 123(3) inhibits a candidate (whatever her own religion or caste affiliation) from asking an oppressed or discriminated class of citizens to vote for her to ensure that their welfare is taken care of as a class.²

While attempting to ground the reasoning in pragmatic concerns, Chandrachud's judgment also fails to take into account the possibility that sectarian appeals in an election need not necessarily be made to one's own religion or caste. Chandrachud's opinion does not answer why Parliament intended to limit Section 123(3) to appeals made to one's own caste or religion rather than *any* caste or religion.

It is not unknown for political parties, otherwise organised on sectarian lines, to have members outside their immediate caste or religious affiliation (Waghmode 2016). When any candidate of such a party is making a sectarian appeal, does her own identity necessarily diminish the sectarian

nature of the appeal or the harm it causes to the larger democratic process?

It is this question that the minority opinion does not really grapple with, and which the majority seems to address adequately in its reading of Section 123(3) of the RPA.

Is the Regulation of Electoral Speech Even Necessary?

While the parties to the case did not seriously press the challenge to the constitutional validity of Section 123(3), the debate does raise one final question: Should law regulate the content of appeals during an election campaign (Mehta 2017; Sengupta 2017)? No one can dispute that a provision such as Section 123(3A), which prohibits promotion of enmity or hatred between classes during election campaigns, should definitely exist, but should plain sectarian appeals be outlawed?

Even if sectarian appeals are not, per se, calling for or resulting in violence, the premise underlying all such appeals is one of these two: that there is no such thing as an Indian or that the question of who is an Indian is dependent on a narrow sectarian criterion. The premise is that we are all some combination of our caste, tribal, religious and linguistic identity, coexisting uneasily

under one common government inherited from a coloniser. Perhaps that is true. The question is: Is that all what we were meant to be?

The Constitution suggests otherwise. Unlike others, the Indian Constitution is not just a documentation of powers, responsibilities and rights, but a charter for social revolution in India and an attempt at forging a new, inclusive identity (Bhatia 2016). Rather than the secular ethos of the Constitution, as Thakur argues, perhaps the true basis for a provision under Section 123(3) lies in the oft-ignored concept of “fraternity”—one which would allow for appeals for the upliftment of all depressed sections without permitting sectarian calls for further segregation and discrimination. The possibilities of grounding the interpretation of Section 123(3) in the concept of fraternity are yet to be explored, and one can only hope that the SC takes this path in securing Indian democracy.

CASES CITED

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Bipin Chandra Parshottamdas Patel v State of Gujarat (2003): SCC, SC, 4, p 642.
Ramesh Yeshwant Prabhu v Prabhakar Kashinath Kunte (1996): SCC, SC, 1, p 130.

NOTES

- For a discussion on the merits of the “purposive” approach to interpretation, see Sarathi and Vepa (2003).
- For an example of such an appeal, see *Jagdev Singh Sidhanti v Pratap Singh Daulta* (1964): SCR, SC, 6, p 750 which is still a good law.

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